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3                   **UNITED STATES DISTRICT COURT**  
4                   **DISTRICT OF NEVADA**

5                   BANK OF AMERICA, N.A.,

6                   Plaintiff

7                   v.

8                   BAR ARBOR GLEN AT PROVIDENCE  
9                   HOMEOWNERS ASSOCIATION, et al.,

10                  Defendants

11                  Case No.: 2:16-cv-00761-APG-NJK

12                  **Order (1) Granting Plaintiff's Motion for  
13                  Summary Judgment, (2) Dismissing as  
14                  Moot Plaintiff's Damages Claims, and  
15                  (3) Denying as Moot Defendant Bar  
16                  Arbor's Motions**

17                  [ECF Nos. 80, 84, 85]

18                  Plaintiff Bank of America, N.A. sues to determine whether a deed of trust encumbering  
19                  property located at 7317 Perkins Hill Street in Las Vegas, Nevada was extinguished by a  
20                  nonjudicial foreclosure sale conducted by a homeowners association (HOA), defendant Bar  
21                  Arbor Glen at Providence Homeowners Association (Bar Arbor). Defendant SFR Investments  
22                  Pool 1, LLC (SFR) purchased the property at the foreclosure sale. Bank of America seeks a  
23                  declaration that the deed of trust still encumbers the property and it asserts alternative damages  
1                  claims against Bar Arbor and Bar Arbor's foreclosure agent, Defendant Nevada Association  
2                  Services, Inc. (NAS). SFR counterclaims for declaratory relief that it purchased the property  
3                  free and clear of the deed of trust.

4                  Bank of America moves for summary judgment, arguing it tendered the superpriority  
5                  amount prior to the sale and thereby preserved the deed of trust. SFR opposes Bank of  
6                  America's motion but did not move for summary judgment. Bar Arbor opposes Bank of  
7                  America's motion and moves to dismiss and for summary judgment, arguing it complied with  
8                  Nevada law and there was nothing wrongful about the foreclosure.

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1       The parties are familiar with the facts, and I do not repeat them here except where  
2 necessary. I grant Bank of America's motion because no genuine dispute remains that Bank of  
3 America tendered the superpriority amount, thereby extinguishing the superpriority lien and  
4 rendering the sale void as to the deed of trust. I dismiss as moot Bank of America's alternative  
5 damages claims against Bar Arbor and NAS, and I deny as moot Bar Arbor's motions to dismiss  
6 and for summary judgment.

7 **I. ANALYSIS**

8       Summary judgment is appropriate if the movant shows "there is no genuine dispute as to  
9 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.  
10 56(a), (c). A fact is material if it "might affect the outcome of the suit under the governing law."  
11 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if "the evidence  
12 is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

13       The party seeking summary judgment bears the initial burden of informing the court of  
14 the basis for its motion and identifying those portions of the record that demonstrate the absence  
15 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The  
16 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a  
17 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531  
18 (9th Cir. 2000); *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) ("To defeat  
19 summary judgment, the nonmoving party must produce evidence of a genuine dispute of material  
20 fact that could satisfy its burden at trial."). I view the evidence and reasonable inferences in the  
21 light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523  
22 F.3d 915, 920 (9th Cir. 2008).

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Under Nevada law, a “first deed of trust holder’s unconditional tender of the superpriority amount due results in the buyer at foreclosure taking the property subject to the deed of trust.” *Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113, 116 (Nev. 2018) (en banc). To be valid, tender must be for “payment in full” and must either be “unconditional, or with conditions on which the tendering party has a right to insist.” *Id.* at 118.

Bank of America has met its burden of establishing that it tendered the superpriority amount in full. The HOA assessment was \$40 per month. ECF No. 86-2 at 5. Prior to the HOA foreclosure sale, Bank of America tendered \$360.00 to NAS to cover the superpriority amount of nine months of assessments. *Id.* at 11-15. NAS refused to accept the check, which was consistent with its policy at the time. *Id.* at 15; *see also* ECF Nos. 84-13; 84-14; 86-1. SFR has presented no contrary evidence in response. Consequently, no genuine dispute remains that the superpriority lien was extinguished and the property remains subject to the deed of trust. *Bank of Am., N.A.*, 427 P.3d at 121.

SFR raises several arguments as to why tender did not extinguish the superpriority lien. None raises a genuine dispute precluding summary judgment.

#### 1. Standing

SFR contends that Bank of America lacks standing to enforce the note and deed of trust because it has not produced evidence showing that the note and deed of trust have been reunified through valid transfers to Bank of America. Bank of America responds that it does not seek to foreclose, it seeks only to determine adverse interests in property, and it has presented sufficient evidence of its interest to have standing for its declaratory relief claim.

The question in this case is not whether Bank of America could presently foreclose. The question is whether Bank of America has a sufficient interest in the deed of trust that it has

1 standing to seek declaratory relief as to the deed of trust's continuing validity. Bank of America  
2 is the beneficiary of record through its merger with BAC Home Loans Servicing, LP. ECF Nos.  
3 84-2; 84-3. SFR has presented no contrary evidence. Bank of America therefore has standing to  
4 seek a declaration that the deed of trust remains an encumbrance on the property. SFR's  
5 contention that some documents in other cases have been shown to be incorrect or inauthentic  
6 does not raise an issue of fact in this case. SFR must show "more than metaphysical doubt as to  
7 the material facts," and it "has not done so here." *Berezovsky v. Moniz*, 869 F.3d 923, 933 (9th  
8 Cir. 2017) (quotation omitted). Speculation that there might be errors is insufficient to preclude  
9 summary judgment. *Emeldi v. Univ. of Oregon*, 698 F.3d 715, 728 (9th Cir. 2012).

10       2. *Evidentiary Challenge*

11       SFR contends Bank of America has not presented sufficient evidence that its tender was  
12 delivered to NAS. SFR contends that the service receipt, which identifies the properties and  
13 checks at issue, does not have any identifying markings to show who generated the document.  
14 SFR also argues that the Legal Wings run slip does not contain a reference number linking it to  
15 the tenders on the service receipt.

16       Bank of America has presented sufficient evidence from which a reasonable jury could  
17 find that it delivered the tender check. The affidavit of Adam Kendis, a paralegal with Miles,  
18 Bauer, Bergstrom & Winters, LLP (Miles Bauer), properly authenticated the documents offered  
19 and explained what the screenshot of Miles Bauer's case management notes reflects. ECF No.  
20 84-7. The notes state that the check was delivered on September 23, 2011, which corresponds to  
21 the date on the Legal Wings runner slip. *Id.* at 15, 19. The notes also reflect that the check was  
22 returned, which corresponds with both the runner slip and NAS's policy at the time to reject  
23

1 tenders with letters like the one sent in this case. *Id.* at 19; ECF Nos. 84-13; 84-14; 86-1. SFR  
2 has not presented any evidence to raise a genuine dispute that the check was not delivered.

3       3. *Impermissible Condition*

4       SFR argues Bank of America's tender was impermissibly conditional because it required  
5 the HOA to subordinate maintenance and nuisance abatement charges. But the Supreme Court  
6 of Nevada has already held that where there is no evidence of maintenance or nuisance  
7 abatement charges, identical Miles Bauer letters did not impose impermissible conditions on  
8 tender.<sup>1</sup> Here there is no evidence of maintenance or nuisance abatement charges, so the tender  
9 letter did not contain impermissible conditions. Additionally, if such charges arose later, the  
10 HOA "would have been required to issue new foreclosure notices if it sought to afford those  
11 costs superpriority status." *Doreen Properties, LLC v. U.S. Bank Nat'l Ass'n as Tr. for Holders*  
12 *of Bear Sterns Alt-A Tr. 2006-3*, No. 75885-COA, 2019 WL 2474893, at \*1 (Nev. App. June 12,  
13 2019) (citing *Property Plus Invs., LLC v. Mortgage Elec. Registration Sys.*, 401 P.3d 728, 731-  
14 32 (Nev. 2017) (en banc) (stating that the HOA is not limited to one superpriority lien but it must  
15 initiate a new foreclosure process to enforce a second superpriority default)).

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<sup>1</sup> See *Bank of Am., N.A.*, 427 P.3d at 117-18; *BDJ Invs., LLC v. Bank of Am., N.A.*, No. 76481,  
20 448 P.3d 573, 2019 WL 4392466, at \*1 (Nev. 2019) ("Because nothing in the record indicates  
21 that the HOA had incurred any maintenance or nuisance abatement charges at the time the tender  
22 was made, the letter cannot reasonably be construed as forcing the HOA to waive its right to  
23 afford superpriority status to any such charges that might be assessed in the future."); *Alliant  
Commercial, LLC v. Bank of New York Mellon*, No. 76565, 443 P.3d 544, 2019 WL 2725620, at  
\*1 (Nev. 2019) ("Assuming without deciding that the tender contained a misstatement of law,  
such a misstatement is not an impermissible condition as it does not require anything of the HOA  
for the HOA to be able to accept the tender. Furthermore, no such [maintenance and nuisance  
abatement] charges are at issue in this case. Thus, the purported misstatement does not alter the  
tender's legal effect.").

1       4. *Equities*

2           SFR contends I should weigh the equities in its favor as a bona fide purchaser. It also  
3 contends that Bank of America waived tender, should be estopped from asserting it, or has  
4 unclean hands because it did nothing after the tender to otherwise stop the sale or advise others  
5 of the tender attempt. Bank of America responds that if its tender was valid, then the deed of  
6 trust was preserved by operation of law, so I should not weigh the equities and SFR's bona fide  
7 purchaser status is irrelevant. Bank of America also argues that SFR is not a bona fide  
8 purchaser. And it contends the equities favor Bank of America. Finally, it asserts that by  
9 tendering, Bank of America did all that it was supposed to, so waiver, estoppel, and unclean  
10 hands do not apply.

11           "[T]ender of the superpriority portion of an HOA lien satisfies that portion of the lien by  
12 operation of law." *Bank of Am., N.A.*, 427 P.3d at 120. Because "valid tender cured the default  
13 as to the superpriority portion of the HOA's lien, the HOA's foreclosure on the entire lien  
14 resulted in a void sale as to the superpriority portion." *Id.* at 121. A "party's status as a [bona  
15 fide purchaser] is irrelevant when a defect in the foreclosure proceeding renders the sale void."  
16 *Id.* For these same reasons, I do not weigh the equities if tender was valid because "the voiding  
17 of the foreclosure sale as to the superpriority portion of the lien is ultimately the result of the  
18 operation of law and not equitable relief." *Salomon v. Bank of Am., N.A.*, No. 75200-COA, 2019  
19 WL 3231009, at \*2 n.3 (Nev. App. July 17, 2019). Finally, Bank of America "has not waived its  
20 right to protect its deed of trust, is not estopped from asserting that right, nor does it have unclean  
21 hands because it allowed [the HOA's] foreclosure to proceed without interceding to halt the  
22 foreclosure" because Bank of America satisfied the superpriority portion of the lien before the  
23 foreclosure, so it "was under no obligation to intercede or halt the foreclosure once it protected

1 its own interest.” *Bank of New York Mellon v. Green Valley S. Owners Ass’n*, No. 1, No. 2:17-  
2 CV-2024-KJD-EJY, 2019 WL 4393356, at \*6 (D. Nev. Sept. 13, 2019); *see also Bank of*  
3 *America, N.A.*, 427 P.3d at 119-21 (tender need not be recorded or deposited into court).

4       **5. Summary**

5           In sum, Bank of America has shown that it tendered the superpriority portion of the  
6 HOA’s lien, thereby rendering the sale void as to the deed of trust. SFR has not presented  
7 evidence in response raising a genuine dispute. Consequently, SFR purchased the property  
8 subject to the deed of trust. I therefore dismiss as moot Bank of America’s alternative damages  
9 claims against Bar Arbor and NAS, and I deny as moot Bar Arbor’s motions to dismiss and for  
10 summary judgment.

11 **II. CONCLUSION**

12           I THEREFORE ORDER that plaintiff Bank of America, N.A.’s motion for summary  
13 judgment (**ECF No. 84**) is GRANTED. The clerk of court is instructed to enter judgment in  
14 favor of plaintiff Bank of America, N.A. and against defendant SFR Investments Pool 1, LLC as  
15 follows: It is declared that the homeowners association’s non-judicial foreclosure sale conducted  
16 on January 11, 2013 did not extinguish the deed of trust and the property located at 7317 Perkins  
17 Hill Street in Las Vegas, Nevada remains subject to the deed of trust.

18           I FURTHER ORDER that plaintiff Bank of America, N.A.’s alternative damages claims  
19 against defendants Bar Arbor Glen at Providence Homeowners Association and Nevada  
20 Association Services, Inc. are DISMISSED as moot.

21           I FURTHER ORDER that defendant Bar Arbor Glen at Providence Homeowners  
22 Association’s motion to dismiss (**ECF No. 80**) and motion for summary judgment (**ECF No. 85**)  
23 are DENIED as moot.

1 I FURTHER ORDER that the clerk of court is instructed to close this case.  
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4 DATED this 13th day of January, 2020.  
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ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE